SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 73

■

NICK FALBO, *Petitioner*

v.

UNITED STATES OF AMERICA

■

ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioner's
REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In an honest endeavor to discharge its duty to stand for and by the judgments of the courts below and to defend them before this Court, the Government has become hopelessly ensnared in many entangling arguments with which the courts below became enmeshed.

This is the result of the effort to justify denial of due process and to sanction the inhibition of the fundamental right to be heard. That sacred right cannot be inhibited.

The Government's plight brings to mind words of Alexander Hamilton, who overcame the plague of specious arguments of honest men who thought they were working for the best interest and welfare of the people in fighting against adoption of the federal Constitution. Of that situa-

tion Hamilton said: "It is astonishing, that so simple a truth should ever have had an adversary; and it is one, among a multitude of proofs, how apt a spirit of ill informed jealousy, or of too great abstraction and refinement, is to lead men astray from the plainest paths of reason and conviction."[1]

Through the eloquence of Government's counsel and the appealing demands of expediency relied upon by them, he who is unsuspecting of the consequences may easily follow the Government in the broad and winding road chosen by the courts below.

Although this reply brief is longer than is usual, its length is necessary to afford petitioner due opportunity to answer the specious arguments and factitious conclusions of the Government. A painstaking analysis of each of those arguments is here presented out of an abundance of caution, solely to help this court and to avoid possibility of any member of the court being led astray from the straight and narrow way of the fundamentals involved.

Petitioner's right to be heard in his defense is so simple and fundamental that the humblest layman in all the land will not dispute it, and certainly judges should not deny it.

Refusal of the trial judge to allow the fundamental issue of exemption and want of jurisdiction to be introduced has brought this case here. It is strange that the Government is blind to the right to be heard on the plea of *not guilty* raising these questions. Misconception of these fundamentals pervades the entire brief of the Government.

Clarification of Questions Presented

It is significant to note, then, how the Government seeks to avoid taking cognizance of this issue in its statement of the questions involved. (Br. p. 2) The very FIRST question posed by the Government seeks to limit the issue to whether

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[1] *The Federalist*, paper No. XII.

or not the court can "try *de novo* the merits of his classification" and entirely overlooks the issue of whether or not the draft board *lacks jurisdiction* to issue the induction order because of petitioner's statutory *exemption* from duty under the Act—non-compliance with which induction order is an element of guilt under the Act.

Similarly, the SECOND question stated by the Government attempts to narrow petitioner's claim to whether the trial court may decide whether the board acted "fairly and upon evidence". Petitioner's claim in truth and in fact is not limited to this narrow question, but involves the much broader issue of whether or not the trial court can determine if the board had jurisdiction to issue the induction order to one who is *exempt* from duty.

Question number THREE does not properly pose the issue because on the questions of *want of jurisdiction* and *exemption* the court can make a *de novo* inquiry and hear evidence *de novo,* not limited to material in the draft file. The Government would have the court believe that the only "question" sought to be raised by petitioner was whether or not the board was "prejudiced" in considering his case. Again it is manifest that claimed prejudice relates to an incidental issue of the board's non-compliance with administrative procedure governing its conduct by denying a hearing and personal appearance before the board, and does not approach the real issue of want of jurisdiction on the part of the draft board. The issue of whether or not the undisputed evidence establishes *want of jurisdiction* or *exemption* was not limited, as urged by the Government, to "claimed prejudice on the part of the local board only". The "claimed prejudice" was in connection with only one of the offers of proof and does not pertain to the issue of want of jurisdiction on the part of the board as raised in other offers of proof, motion to dismiss, objections to the charge and requested charges. The Government's proof showed a *want of jurisdiction* on the part of the board; and the alleged defects in certain offers of proof urged in its question THREE

do not affect the power of this court to hold that the indictment should have been dismissed, or that the court erred in charging the jury and in denying the requested charges.

Petitioner's Status Under the Act Entitles Him to Exemption from Training and Service

Elsewhere in the brief the Government intimates that the question here presented is whether or not the board allowed a fair hearing, acted contrary to evidence, arbitrarily and capriciously denied claim for classification, or erred in judgment. The defendant, who is a *minister* and exempt from duty under the Act, is not thus limited in his defense to the indictment. He is entitled to have the court or jury find, independent of any narrow-gauge inquiry, whether or not he is a "minister of religion" and as such exempt from duty under the Act. If the Government fails to prove beyond a reasonable doubt that the registrant is under a duty to serve, a judgment of dismissal of the indictment must issue for want of jurisdiction of the local board.

The Government's difficulty seems to be that it fails to recognize the distinction between the status of persons *exempt* from obligations imposed by an Act of Congress and the status of persons subject to the obligations of such Act but who, in the discretion of the administrative agency, may be *deferred* for reasons found valid by the administrative agency.

When one is of a class of persons expressly exempted by an Act of Congress from any duty thereunder an agency charged with administering the act has no jurisdiction to direct the exempted person to perform duties required of those subject to the act. The anomalous position of the Government on this question is contrary to an old and unanimous opinion by this court in *Wise* v. *Withers*, 3 Cranch 331. There the Militia Act of 1792 exempted officers of the federal government from training and service. Wise, a justice of the peace of the District of Columbia, refused

to report for induction as directed by the administrative tribunal. He was proceeded against according to the statute before the military tribunal and his property confiscated. Chief Justice Marshall, speaking for the court, held that a justice of the peace of Washington, D. C., was a federal officer within the meaning of the act and hence the tribunal was without jurisdiction to order Wise to report. This court said that the order was void and was, therefore; subject to a collateral attack. That case is discussed in petitioner's main brief, pages 60-61.

History of prior draft and militia acts of this country fails to reveal any case where a minister has had a controversy with draft authorities in the courts as to his ministerial exempt status. It is assumed that it was so plain that no "board" has dared to transgress the acts of Congress creating the exemption. The only case to be found in the state reports involving the militia acts is that by the Supreme Court of Alabama in the case of *Ex parte Cain*, 39 Ala. 440, 441 (petitioner's main brief, pages 74-75), holding that a draft board, under the conscription act of the Confederacy during the Civil War, did not have jurisdiction to induct a minister for military service. This indicates that there can be no distinction between exempt status of a federal officer and the exempt status of a minister of religion.

By terms of the Selective Training and Service Act "regular and duly ordained ministers of religion" are exempt from training and service and are, therefore, beyond the induction process of the local boards. "There are included in the legislative exemptions those classes whose status is determined in such a way that the administrators of this law can take cognizance of that status and eliminate them."[2]

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[2] General Crowder, Provost Marshal General, testifying before the Committee on Military Affairs of the House of Representatives when the Selective Training Act of 1917 was being considered. See petitioner's main brief, pages 66-67; also, footnote 99, page 68, op. cit.

The Government's erroneous claim, that there is no such distinction, is based upon the false conclusion reached by a distortion of the language and intent of Congress. The Act provides that the local and appeal boards shall have the power to determine all questions or claims with respect to exemption or deferment from training and service. The Government contends that this provision gives uncontrolled discretion to such boards to construe and misconstrue both the Act and the administrative regulations, while the federal courts must keep *"silence"* and merely stand by to *punish* those who may run afoul of the boards' determinations. (Brief, pages 17, 21, 24-25) Under this interpretation any conflict between the Congressional legislation and the administrative application thereof would at once be resolved in favor of the latter, while the United States court would be powerless to interfere. This makes the administrative board the *supreme court* for construction of the Act, and its determinations become the *supreme law* of all the land.

All the Act requires of a minister is to register with his local board so that the Selective Service System has a record of him as a *minister*. Each "minister of religion" fills out a questionnaire and in the space provided (Series VIII. See Record, page 56.) may state that he is a *minister of religion*. The power of the board to decide the claim of exemption does not expand the jurisdiction of the board to a point of allowing the induction of a minister, exempt from training and service. Petitioner's claim for statutory exemption because of occupying the office of *minister* is fixed, definite and certain; and can be as easily determined as the claim for statutory deferment made by a governor, judge, congressman, state legislator, or vice-president of the United States.

Congress has determined the exempted class. If in fact one is a minister, duly recognized by his denomination, the board has no discretion to deny the claim. The making of the claim for exemption as a minister is tantamount to

making a claim that the local board does not have jurisdiction over the individual making the claim. The board has the duty and the power to determine this *plea to its jurisdiction;* but the fact that it decides that it has jurisdiction to induct does not give it such jurisdiction. The making of the plea to the jurisdiction by a minister is analogous to a defendant making a plea to the jurisdiction of a court. If the court is without jurisdiction to render a final judgment against defendant, its findings and judgment are void and may be collaterally attacked in another court anywhere at any time. When a local board orders a "minister of religion" to report for induction it is equally as void as a judgment of a justice of the peace rendered on default of defendant for $1,000,000 or for title to real estate. If a justice of the peace should entertain such suit or action against another, the defendant has the right to appear and file a plea in abatement, a plea to the jurisdiction of the court. The fact that the defendant files such a plea does not confer jurisdiction upon such justice of the peace regardless of whether the plea is overruled or sustained. The draft board entering a proper IV-D classification for an ordained or regular minister acts in the same manner as the justice of the peace in sustaining the plea to his jurisdiction. Denial of the claim does not confer jurisdiction on the board to induct the registrant to perform service under the Act, any more than would the denial of the plea to the jurisdiction of the justice of the peace give him jurisdiction.

An ambassador to the United States from another nation is exempt from the jurisdiction of all courts inferior to this court. Suppose an ambassador were sued in some inferior court. Without doubt he could question the jurisdiction of that court. That the inferior court has the privilege of hearing and deciding a plea to the jurisdiction does not give that court jurisdiction over the ambassador. If a defendant in such a circumstance impersonated an ambassador and *falsely* made the claim, such inferior court could

find the claim to be fictitious and on that ground overrule the plea to the jurisdiction.

The same analogy applies to the power of the local board when one claims exemption because an ordained minister, or deferment because a judge, legislator or governor. If a man is in truth and in fact authorized by a recognized Christian organization, there is only one thing a board can do when he claims ministerial exemption from service and that is to place him in Class IV-D. If the claim for exemption is falsely made or is fictitious, then and only then can the board deny the claim. But in such instance he must be found guilty of false swearing or perjury in his claim, because until his claim is impeached or controverted by *written evidence* in his file he is entitled to the exemption claimed. Before any court or board can reject the claim for ministerial exemption it must be established that the registrant or defendant has violated the provisions of the statute forbidding false swearing. A board has no discretion to decide whether it will give the vice-president of the United States a deferment or deny a "minister of religion" an exemption granted by Congress. Until the claim is impeached as a *false claim* the board has no discretion to deny it.

It is said that claiming citizenship in deportation cases constitutes a plea to the jurisdiction requiring a *de novo* inquiry by the court. See *Ng Fung Ho* v. *White*, 259 U. S. 276, where it was said that in cases reviewing validity even of court-martial convictions a *de novo* inquiry could be made on jurisdictional issue of whether one actually volunteered or was subject to military authority. This was also stated in *Crowell* v. *Benson*, 285 U. S. 22, at 58. See also *Givings* v. *Zerbst*, 255 U. S. 11, 20; *In re Grimley*, 137 U. S. 147.

The Government does not contend that there was any evidence before the board that might indicate that petitioner was not recognized by the *Watchtower Society*, or that he was not actually ordained as a minister of Jehovah's witnesses, or that he was not actually preaching *full time as a*

pioneer at all times herein. The Government concedes that the Watchtower Society and Jehovah's witnesses are recognized religious organizations under the Selective Training and Service Act. It is conceded that the director has declared them to be so "recognized" under the Act. There is nothing in the file of petitioner that impeaches or negatives any of the above facts. All evidence must be reduced to writing by the local boards and placed in the file. (Reg. s. 623.2. See, also, Opinion No. 14, par. 6, Appendix pp. 39a, 43a.) There is no such evidence in the file which might dispute the claim for a IV-D classification. The Government does not contend that petitioner falsified his questionnaire or falsely impersonated a minister. This makes it mandatory that petitioner be declared exempt *as a matter of law*.

Plea in Abatement Not Urged To Present Issues

The Government in its brief would have the court believe that the vital question, as to whether petitioner should be declared exempt, is presented to this court by an assignment of error on the trial court's action in overruling the plea in abatement to the indictment. The assignment of error as to overruling this plea is not briefed and is not urged in this court. It is doubtful that a plea in abatement is the proper way to raise the question of exemption from duty under the Act. (See *Goff* v. *United States,* 135 F. 2d 610.) The fundamental question of *exemption* was presented on the trial court's overruling the motion to dismiss the indictment presented at the close of the Government's case. This court can *sua sponte* determine whether upon all the evidence the defendant is not guilty and the indictment should be dismissed. (See cases cited in footnote 97, page 67, petitioner's main brief.) In *Johnson* v. *United States,* 318 U. S. 189, 200, 63 S. Ct. 549, 555, the court said: "It is true that we may of our own motion notice errors to which no exception has been taken if they would 'seriously affect the fairness, integrity or public reputation of judicial pro-

ceedings.' See *United States* v. *Atkinson*, 297 U.S. 157, 160; *Clyatt* v. *United States*, 197 U. S. 207, 221-222."

Scope of Judicial Review

The Government attempts to avoid the impact of *Crowell* v. *Benson*, 285 U. S. 22, on the theory that "ministers are not constitutionally exempt". (See Government's brief, pp. 16, 26-27) This argument does not "hold water" because the *de novo* jurisdiction of the United States District Court does not depend on whether *'freedom* of *religion'* guarantees an exemption from military training and service. Freedom of worship under the *First Amendment* is not involved or presented here. *Crowell* v. *Benson*, supra, applies because the *constitutional right of due process of law* has been violated by the local board in denying the petitioner his liberty by ordering him to report for training and service when the undisputed evidence before the board showed that he had a *statutory right of exemption* because he was in fact a minister. The denial of that statutory right constitutes a denial of liberty without *due process* of law by the board so as to permit the *federal court* to make a *de novo* inquiry. The Government's argument that *Crowell* v. *Benson*, supra, does not apply because the Act places the duty on the boards to decide claims for exemption is contrary to *Wise* v. *Withers*, 3 Cranch 331. See pages 4-5, supra, this reply brief.

If, while in office, a congressman, a judge, a state legislator, or the nation's vice-president, believing he could serve the country better on the "home front" by remaining at his post of duty than by going to the "battle front", were erroneously denied his statutory deferment from training and service and he thereafter refused to report for induction and was indicted, could such official set up his statutory deferment as a defense? It must be admitted that in such an instance the district court could make a *de novo* inquiry as to *his status* under the Act.

The right to a *de novo* judicial determination of the statutory exemption of a minister is also controlled by the "Land Office cases", involving tracts of land of the type exempt from homestead and preemption, where Land Office orders granting patents were held not to convey title. Such orders have been held subject to *de novo* judicial inquiry on whether the Land Office had *jurisdiction* over *exempt* lands despite finding of fact that they were not exempt. *Burfenning* v. *Chicago St. P. Ry. Co.*, 163 U. S. 322, 323; *Morton* v. *Nebraska*, 21 Wall. 660, which are closely in point.

In any event, the district court, in the exercise of its judicial powers in a criminal case, must ascertain whether a defendant, who has pleaded not guilty, is under any duty to undergo training and render service required by the Act. While it is contended that the court cannot make a *de novo* inquiry as to petitioner's ministerial claim, it must, at least, review the Selective Service *file* of the registrant, and decide whether the registrant is exempt from duty or whether the local board lacked jurisdiction to issue an induction order.

In respect to the statutory exemptions allowed by Congress, the relation between the district court and the local board is very much like that between this court and the highest court of a state in a controversy where a *federal question* is involved. In such instances the district court has jurisdiction to review the question of statutory exemption. In regard to those subject to training and service and the administrative deferments that are allowed them in the discretion of the Selective Service System the power of the district court *may* be claimed to be analogous to that of this court on local or non-federal questions in controversies coming up from state courts, except the district court may review classifications where there is shown to be a violation of *due process* of procedure or discrimination against an individual in such instances of discretionary deferments.

The Government greatly stresses and leans heavily upon *Monongahela Bridge* v. *United States*, 216 U. S. 177. This case breaks away and gives no support to the Government because it did not involve a case of statutory exemption but presented the instance where one subject to the Act empowering the Secretary defied his order. If the bridges involved in that case had been exempt by Act of Congress instead of administrative discretion, the jury would have been permitted to pass upon the question of exemption.

Hirabayashi v. *United States*, 319 U. S. —, 63 S. Ct. 1375, does not govern the issues presented in this case. The question involved there was whether the *curfew order* was an unconstitutional delegation of authority and discrimination against Japanese. The validity of the exclusion order was not determined in that case. The orders were made on a race or group basis and not on an individual basis as are determinations by local boards under Selective Service Regulations. It can be assumed with confidence that if the law or the orders involved in that case provided for exemption of "loyal" Japanese an inquiry thereof would have been permitted in defense to an indictment charging a violation. Suppose that a Filipino or a *Chinaman* had been mistakenly included in the *curfew order* or the *evacuation order*, and for violation of either or both he were indicted. It must be conceded that in defense to indictments identical to the charges in the *Hirabayashi* case the Filipino or *Chinaman* thus ensnared could prove his nationality and show that the statute and orders did not apply to him. It would be a violation of due process to compel him to comply with the orders as a condition precedent to questioning them.

In the *Hirabayashi* case the defendant actually defied the curfew order and the evacuation order. Nevertheless this court considered his defense that the curfew order was void. In that case the Government did not contend that the defendant was not entitled to raise and the court was not entitled to consider the defenses urged because he had not

complied with the order. If a defense as to the *constitutionality* of a particular order can be considered on the ground that it involves a determination of the constitutionality of the curfew order, then with equal force of reason the *courts* can also construe the order or statute and consider whether the particular order is applicable to the facts or is illegal because contrary to the statute authorizing it, in that the person affected is *exempt* or the administrative agency *did not have jurisdiction*, without requiring that he comply with the order. It seems plain that if an order of an administrative agency is legal it should not and can not be flouted; but that if an order of such agency is illegal and void, then as a matter of fact it cannot place any citizen under an obligation to do anything. If the citizen chooses to ignore an invalid, unlawful order, no one would contend that he would be prevented from setting up this fatal defect in any subsequent prosecution that might be instituted against him.

Presumption of Innocence Is that Petitioner Was Under No Statutory Duty

The brief of the Government attempts to chisel down the presumption of innocence of the petitioner. (Br. pp. 22-23) It is said that the presumption is limited to the fact that he did not disobey the order and that if he did, he did not do so willfully. (Br. p. 22) Petitioner is prosecuted for an alleged violation of the criminal sanction clause (Sec. 11) of the Selective Training and Service Act. Elements of guilt defined in the statute are much broader than the narrow presumption allowed by the Government. The statute provides: "Any person charged as herein provided with the duty of carrying out any of the provisions of this Act." In the case of a registrant an element of guilt noticeably involves the duty for training and service. The presumption of innocence, if it means anything, necessarily includes the presumption of 'no duty', so as to place upon the Government the burden of proving a duty or obligation and trans-

gression thereof beyond a reasonable doubt. The Government excuses itself from this responsibility by reclining upon the presumption of validity of the order to report for induction. This presumption *gives way* under the weight of the heavier and stronger presumption of innocence, and the soft bed which the Government builds for itself collapses.[3]

Here the district attorney did not rely solely upon the presumption of validity of the order to report. Had he real faith in the *soundness* of the Government's position he would have rested with the order to report for induction. But he went further and also introduced the questionnaire. The questionnaire refuted the claim of duty, because it showed petitioner exempt. The Government did not show, or even contend until *after* reaching this court, that *he was not* entitled to the exemption.

The danger to the public and to the courts of the Government's position appears when the same whittling process is applied to the presumption of innocence in a murder case. The defendant is presumed to be not guilty of killing with malice aforethought. The Government, however, would limit the presumption, by the rule urged in this case, to whether or not the defendant intentionally shot a bullet into the body of the deceased. Of course, the reason for the Government's position on the presumption becomes apparent. It is necessary to narrow the presumption in order to support the equally ridiculous position that a defendant cannot show in defense to the indictment that he has no duty under the Act.

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[3] No legal presumption is so highly favored as that of innocence; ordinarily, substantially all other presumptions yield to it in case of conflict. *Jones on Evidence, Civil Cases*, 4th Ed., Vol. 1, pp. 176-180; *Dunlop* v. *United States*, 165 U. S. 486; *Edwards* v. *United States*, 7 F. 2d 357; *Underhill's Criminal Evidence*, pp. 49-54. See also *Tot* v. *United States*, 319 U. S. —, 63 S. Ct. 1241.

Petitioner Has Right To Defend Against Indictment

(A)

HABEAS CORPUS NO MORE EFFICACIOUS THAN RIGHT TO DEFEND AGAINST INDICTMENT

Petitioner agrees with the Government that the defenses available under the statute have not been expanded. The Government must concede that the defenses have not been narrowed or reduced in scope by the terms of the Act. The plea of *not guilty* necessarily raises all defenses available, so as to include the defense of *no duty* for training and service under the Act. The Government admits that the district courts can inquire into the duty of the registrant for training and service under the Act, but says that it can do so by habeas corpus only after the registrant has reported. The distinction drawn by the Government so as to allow one who submits to an *illegal* order the right to question it and, on the other hand, to deny the person who refuses to submit to the illegal order the same right, is an arbitrary discrimination that violates the *due process* clause. This specious argument can be given a reverse application so as to deny the writ of habeas corpus. If defiance of an illegal order is ground for denying a defense to an indictment for failure to comply with it, then, by equal force of reason, the submission and consent to an illegal order would waive the right to attack it. Respondent's argument ignores entirely the right of the registrant to defend himself against a local board that flouts the law and tyrannically acts unlawfully and arbitrarily against him.

Local boards are not above the law which created them. They must recognize the exemptions Congress decreed in the same act which gives the boards existence.

In attempting to gain credence for its argument in this case, the Government drives a peg into the wall and 'hangs its *hat*' thereon by claiming that the Act which provides

decisions of local boards "shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe", *means* that a district court is powerless to review, in criminal prosecutions under the statute, the action of a local board illegally ordering one to report for induction. The same contention is made with respect to the effect of the provision that boards "shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption . . ." That "peg" falls out when it becomes apparent that the same provisions could, by the same token in habeas corpus cases, also be used to deny the district court authority to review a classification *after* induction. If it cannot be denied an inductee *after* induction, then there can be no grounds for denying the right to a registrant who refuses to comply with the order and defends against the indictment charging him with a violation of the Act.

The Government's argument that an admitted defense is not available to the defendant indicted under the Act has the effect of denying the registrant a trial in the district court contrary to Section 11 of the Act.[4] Such construction gives the Act an unreasonable and arbitrary and unconstitutional interpretation. It is contrary to the spirit of the Constitution as expressed in the opinion of this court in *Wong Wing* v. *United States*, 163 U. S. 228.[5] If the lawmakers intended what the Government says they did, then Congress would have dispensed with the formality of requiring the registrant to *run the gantlet* of trial *by ordeal*—a "per curiam" trial in the district court on the one question, "Did you report?"

In its brief the Government seeks to justify its confession that district courts can inquire into the exemption of

[4] See Senator Reed's amendment to the Burke-Wadsworth Bill quoted at page 46 of petitioner's main brief.

[5] See petitioner's brief, pages 33, 55.

the registrant or want of jurisdiction of the local board by habeas corpus proceedings, on the ground that the citizen has the constitutional right of habeas corpus. It is inferred thereby that a defendant in a criminal case does not have the right under the Constitution to defend, especially in a *Selective Service* case. This is an extraordinary revelation in the field of constitutional law and criminal procedure. It seems clear that the Bill of Rights (Amendments V and VI) guarantees the right to make a defense to an indictment charging crime. This should emphatically refute the Government's claim that the defenses of statutory exemption from duty and want of jurisdiction on the part of the local board are not secured to the petitioner by the Constitution.

Petitioner agrees with the Government that habeas corpus is an available remedy to one wrongfully inducted. The fact that habeas corpus is available *after* conviction does not mean that the right of defense is deniable any more than it can be said a contention that an indictment was returned in violation of the Bill of Rights can not be urged in defense at the trial on the theory that the same defect could be urged upon habeas corpus after conviction. Habeas corpus is not an exclusive remedy but has always been regarded as extraordinary, never available as a substitute for statutory and other constitutional remedies.

(B)

CONCERNING PRACTICAL CONSIDERATIONS

To protect itself from toppling off the swaying tower of "legal" *considerations* it erected to hold itself above the reach of the *due process* clause, the Government has constructed a net of entwined sophistry wherein to arrest the impending fall, which "net" it styles the "practical considerations"—*"The administrative process must not be unnecessarily impeded."* (Br. pp. 30-53) When put to the *fiery* test of judicial scrutiny that network of *policy* arguments blows away as *smoke* before the wind.

(1) *Congress considering these arguments has not limited available defenses.*

Furthermore, those same *practical considerations* and arguments were before Congress and within its view when the criminal sanctions clause (Section 11) of the Act was amended so as to give the United States District Court exclusive jurisdiction over those who fail to report for duty.[6] The failure of Congress to provide for denial of the right of defense shows that it rejected such *practical considerations* now urged by the Government.

(2) *Certain cases relied upon by Government distinguished.*

The doctrine announced in *Houston* v. *Moore* (5 Wheat. 1, 35) and *Martin* v. *Mott* (12 Wheat. 19) is invoked by the Government. (Br. pp. 47-48) Those cases do not control here because they concern persons enrolled in the militia and subject to military authority. In those cases the court was not speaking of that class of persons exempt from training and service and beyond the jurisdiction of the militia. With the statements made in and the conclusions reached in those cases we have no quarrel. They are distinguishable from the facts of the case at bar (governed by *Wise* v. *Withers*, 3 Cranch 331) and are not applicable here.

Even as affecting registrants who are subject to the terms of the Act and not exempt, it is doubted whether *practical considerations* would be sufficient to deny a constitutional right of trial and defense. Such matters of policy and considerations certainly could not justify denial of rights of defense to that class of persons exempted from the process of the local boards. It would not justify submission to the illegal order to report as a condition precedent to urging its invalidity.

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[6] See petitioner's main brief, page 46.

(3) *Defense to indictment is no more harassing than habeas corpus.*

Much stress is placed upon the need to protect the administrative process against harassing litigation. It appears that habeas corpus is available, but the Government raises no objection to that harassing instrument. Habeas corpus directly affects the military organization and has a tendency directly to frustrate the military and naval efforts in training. If the inductee is unsuccessful in prosecuting his habeas corpus action and persists in his claim that he is not subject to military jurisdiction or argues his classification, *after* acceptance in the armed forces, and does not comply with military orders, he is subject to much more severe penalty than could be given him under the Act if he had never reported in the first instance.

(4) *Denial of due process cannot be used to discourage violation of the Act.*

Further, the Government argues that denial of a defense has a tendency to force the men into the armed services, and compliance with the process of the administrative agency does not warrant denial of *due process of law* in the courts. The army is raised to protect the institutions of democracy. Forfeiture of *due process* should not be the cost of increasing the armed forces. In approximately 2500 cases prosecuted under the Act, 1200 of which are against Jehovah's witnesses, the right to a defense has been denied under the *Grieme* rule in violation of *due process*. It cannot be argued that allowing the defense of statutory exemption from duty of training and service would cause registrants subject to the Act to refuse to perform their duty. Only those exempt in fact can rightly and effectively refuse to respond. Citizens and others subject to training and service under the Act must be presumed to do their duty; and if not exempt, it will be presumed that they will report for training and service as required by law.

The argument that allowance of the right to claim due process of law in the courts will open the courts to review *every* classification (resulting in breakdown of the induction process and Selective Service machinery) insults the patriotism and law-abiding nature of Americans and displays weak and little faith in democratic institutions and the ability of the republic, the federal government, to protect itself and the states of the Union in time of peril. A democracy need not turn to totalitarian practice when she calls her men to arms and they draw the sword to war against the foe. It is a fundamental concept of warfare that without a *home front* there can be no *battle front*. In wartime it is equally important to protect the *home front* as it is to sustain the *battle front*.

The Government makes the astonishing argument—a *new theory* in the field of criminal law—that the right to defend must be denied in Selective Service prosecutions so as to discourage increase of registrants' willful failure and refusal to report for induction. Strange it is that this *theory* had not been previously discovered and applied in the trial of murder cases and other atrocious crimes. The argument is patently contrary to the fundamental concept of trial of criminal cases since the common law. It is said that to permit the courts to inquire whether or not one is exempt or whether the board had jurisdiction over the registrant would inevitably lead to the penitentiary. That is doubted, as long as the district courts maintain their integrity and maintain procedural due process while honestly attempting to render justice to the people. Of course, as it is now, with the integrity of the courts broken by the *Grieme* rule, it is impossible for a man to obtain an acquittal under the Act; and naturally his urging the defense of statutory exemption inevitably leads to the penitentiary because he is denied the right to be heard.

The Administrative Order Here Sought To Be Reviewed Is Not Interlocutory But Is Final

Extended argument is made by the Government that the order to report is not a final order and hence cannot now be disturbed by the judiciary. (Br. pp. 54-57) Petitioner's main brief (pages 49-53) sufficiently answers that contention.

According to the Government's theory of the order to report not being a final order to permit judicial review, a person to whom the Act did not apply could be thrown into the administrative machinery, geared and greased as it is for war, and there would be no way under the law for the judicial authority to intervene and rescue the innocent one until *ground up* completely in the administrative machinery.

The entire argument of the Government as to order to report not being final until acceptance on *final-type* physical examination at induction center does not apply to one classed IV-E, who, in every case, is given a final physical examination before the notice to report issues. (Reg. 651.1-651.8) But even if it were the same as process of selection in the case of the I-A classification, the right to defend the indictment could not be affected by failure to report, because a civilian cannot be required to submit to a process that can subject him to military or naval jurisdiction and possible court martial, in order to secure his rights upon the vague, indefinite and uncertain contingency of possible rejection on physical examination. This cannot be made the criterion of determining where military jurisdiction begins and civilian status ends. It has been held that military jurisdiction attaches, not only upon physical examination, but also upon reporting or appearance at the induction center. See the interpretative regulations of the War Department and also *Benesch* v. *Underwood*, 132 F. 2d 430. The interpretation placed on the Selective Service Regulations as to line of demarcation between civilian status and military status in the process is void because it collides with Section

11 of the Act and defeats the jurisdiction of the United States District Courts under the Act.

The Government's theory of *no final order* was definitely rejected by two dissenting judges of the Circuit Court of Appeals for the Third Circuit: *In the Matter of the Petition of Sam Catanzaro, Jr., for Writ of Habeas Corpus,* decided September 23, 1943. Judge Biggs said: "Nor can I agree with the ruling of the majority that the administrative processes are not completed until, in the language of *United States* v. *Kauten,* 133 F. 2d 703, 706, 'the army makes its choice' and accepts the registrant for service after he has passed his physical examination. The registrant is in the custody of the military authorities from the moment that he has reported for induction, even though those authorities may see fit to reject him subsequently." [7]

Petitioner Attacked Decision of Both Local Board and Appeal Board By His Plea To Their Jurisdiction.

The final classification of IV-E was given to petitioner by the local board. (R. 58) On July 15, 1942, one month after action of the appeal board, the local board said: "Reclassified in Class IV-E as per classification recommendation of the Appeal Board." From the record it is clear that the Government's statement that the *final* classification was made by the appeal board rather than the local board is not entirely correct. Cf. Reg. s. 627.26.

The Government argues that since the classification of

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[7] Judge Maris joined with Judge Biggs in the dissent. In this dissent there is to be found an excellent argument in behalf of this petitioner on the question here presented, to wit, the nullity of the order to report, want of jurisdiction of the board and no need to report for induction as a condition precedent to questioning the order. Judge Biggs said: "I see a glaring inconsistency in the proposition that the registrant who obeys an invalid order of his draft board and reports for induction may avail himself of the writ as the means of having the order adjudged a nullity, while the registrant who does not obey a similarly invalid order by reporting for induction and in consequence is arrested may not do so."

IV-E was first made and recommended by the appeal board, and that classification was *de novo*, it is necessary to make an attack against the board of appeal specifically. When the local board accepted the classification of the appeal board and changed the classification from I-A to IV-E it was not necessary specifically to name the appeal board's action in the motion to dismiss, the requested charges, the exceptions to the charge and in the various offers of proof. The attack against the order to report was an attack against the action of both boards because both had denied his claim for exemption as a minister. It was unnecessary to charge either board with prejudice as condition precedent to the attack upon the order to report. If the evidence shows no jurisdiction or that petitioner is exempt, it follows as a matter of law that the boards have violated the law in ordering him to report, regardless of prejudice.

The change in classification from I-A to IV-E does not weaken petitioner's objection that the draft board did not have jurisdiction to induct him. On both I-A and IV-E classifications the local board and appeal board rejected his claim for statutory exemption. The objection, that the local board did not have jurisdiction *to order him to report for induction*, constituted an attack against the action of the local board and the appeal board in rejecting his claim for exemption.

The argument that the action of the appeal board is *de novo*, so as to destroy the assignments of error, is hypercritical, technical and without merit. This extensive argument of the Government may be applicable to the case of an individual subject to the required training and service under the Act but is entirely immaterial in the case of one exempt from duty under the Act.[8] Falsity of that delusory argument becomes apparent when it is conceded that if the local board did not have jurisdiction to induct petitioner for any service under the Act a mere change of classifica-

[8] See argument in Government's brief, pp. 58-61; see, also, its brief in *Bowles* v. *United States* (319 U. S. 33), pp. 36-38, 71-79.

tion from I-A to IV-E by the appeal board or local board would not confer jurisdiction over petitioner.

Petitioner Attacked Decision of Both Local Board and Appeal Board By Offering To Show Denial of Personal Appearance Before Local Board

Offers of proof have been confused by the Government. It says that the offers related to prejudice. The only offer tending to show prejudice on the part of the board was that wherein petitioner sought a personal appearance before the local board, which was denied by the chairman who said that he had 'no damned use for Jehovah's witnesses'. A personal appearance is provided by the Regulations. (Reg. ss. 625.1, 625.2) This action of the local board was a violation of *procedural due process*.[9]

Since no provision was made for a personal appearance before the appeal board the fact that the appeal board changed the classification from I-A to IV-E did not cure the violation of the Regulations by the local board denying a personal appearance. The only way this could be remedied was by allowing the petitioner a hearing before the local board. It was never permitted.

In the various offers of proof of *documentary evidence* by petitioner it is not contended that the local board refused to receive the evidence. All the evidence offered was in writing and was in petitioner's *cover sheet* or file and was considered by the appeal board and the local board. It was not necessary that petitioner comply with Section 627.12 of the Regulations by sending rejected evidence to the appeal board along with his appeal, because the local board did not reject any evidence offered to it. Therefore the Government's argument, implying that petitioner's offer of evidence was of material rejected by the board, is very misleading and confuses the issues. See Government's brief, p. 60.

[9] See petitioner's main brief, page 102, footnote 187.

Director of Selective Service Never At Any Time Passed Upon Petitioner's Ministerial Status

Referring to parts of the Selective Service file, the Government says such were not offered by either party in the trial court, and which show that application to have petitioner's name added to the *certified list* was denied by National Headquarters.[10] Petitioner has no objection to this action being drawn to the attention of the court. It is assumed that this court can take judicial notice of the ruling of the Director in this regard.[11] However, this action cannot be taken as any indication that the petitioner was not in fact a "minister of religion" according to Section 5 (d) of the Act. The established list was not a determination by the Director that men whose names on it were ordered to be classified as ministers *ipso facto,* but establishment of the list was as a convenience to the administrative branch of the System and to the listed registrant for the handling of appeals, and was not the sole criterion in determining whether one on the list or not on the list should be entitled to a IV-D classification. It must therefore be assumed that the denial of the request to have petitioner's name added to the list is not material.[12]

This court can also take judicial notice of the action of the National Director in June 1942, in advising the State Director, in response to a communication from petitioner,

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[10] See Government's brief, pages 10-11, footnote 5.

[11] See *Bowles* v. *United States,* 319 U.S. 33; *Caha* v. *United States,* 152 U.S. 211, 221, 222; *Thornton* v. *United States,* 271 U.S. 414, 420; *The Paquete Habana,* 175 U.S. 677, 696.

[12] See petitioner's main brief, pages 92-93; also letter of General Hershey, the Director, as to legal effect of the list, APPENDIX A, infra, pages 45-49, this brief; and also quotation from the Government's brief in *Benesch* v. *Underwood,* 132 F. 2d 430, signed by the Assistant Attorney General and Assistant General Counsel of the Selective Service System, APPENDIX B, infra, pages 49-50, this brief.

that there was nothing in the correspondence that would warrant further action by the Director. The Government has properly drawn this fact to the attention of the court. (See Government's brief, page 42, footnote 34.) This action does not constitute a determination by the Director that petitioner was not a minister or not entitled to a IV-D classification from the local and appeal boards. The Director's refusal to take further action is merely a refusal to exercise his discretionary jurisdiction conferred under Section 628.1 of the Regulations. The action was taken on basis of the letter from petitioner to the Director and not on review of his file. Such action is the same as this court's denial of certiorari which "imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States* v. *Carver*, 260 U. S. 482, 490.

Whether or Not Petitioner Introduced His Entire File into the Evidence To Support His Attack Against the Boards' Jurisdiction is Immaterial

Petitioner says that it is entirely unfair and improper for the Government to advise the court that there were other parts of the file which were not offered in evidence, unfavorable to petitioner.

The record on file and agreed upon by the petitioner and the Government as a basis for a review of this case does not show that any evidence existed or was in the file which disputed his claim for exemption as a minister. It is doubtful whether this court can take judicial notice of the contents of a Selective Service file, including all immaterial parts, papers, forms, letters, affidavits and documents; especially where the file was not before the National Director in connection with the rulings made by him. For the purposes of determining the sufficiency of the offers of proof of the various pieces of documentary evidence contained in the file, since nothing to the contrary appears, it

must be assumed that the proffered evidence constituted the entire file and all material parts thereof. If the offer was defective because not constituting all the file, the defect should be made to appear in the record. The Government cannot assert to this court, *for the first time*, on a basis of an investigation *aliunde* or *de hors* the record, that all the material parts of the file were not offered. Certainly it was not necessary to introduce any parts of the file which were not material to the classification or claim for IV-D exemption. If there was any unfavorable evidence in the file the Government did not offer it. Cf. *Edwards* v. *United States*, infra.

Moreover, the cases upon which the Government relies as grounds for its contention that everything in the file must be offered do not involve a situation where, as here, there is an inquiry as to whether or not the board had jurisdiction. The petitioner offering the evidence was entirely exempt from the induction process and authority of the administrative system, and the administrative agency had violated the *due process* clause in making its decision. Cases cited by the Government (Br. pp. 61-62) as basis for holding the exclusion of the evidence harmless error do not control here and, if applicable at all in a draft case, would be confined to instances of court review of classifications of persons subject to the Act, and not to instances where there is no jurisdiction. The rule could not apply to the case of one exempt from the Act, as is petitioner. (*Crowell* v. *Benson*, 285 U. S. 22; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 49-54) Furthermore, since the documentary evidence offered by petitioner was excluded on the theory that the trial court *had no authority* to question the action of the local board in ordering petitioner to report for induction, it seems that an offer of a part of the file alone would be sufficient to raise the question. The trial judge specifically held that the offers were sufficient to raise the question when he ruled: "I think this whole matter is covered by your first offer under the rules of court." (R. 38)

If the Government's inference is correct, that this court can take judicial notice of the contents of the *file*, then it is unnecessary to offer any part of the file; and the failure to offer all the file would not militate against documentary evidence offered.

Petitioner says that this court cannot consider and hear *de novo* any new evidence, outside the record, which was not before the district court. The petitioner is entitled to a trial by jury before the district judge. The record made before the trial court should determine his guilt and not new evidence presented here *for the first time*. The anomalous theory of the Government on this point would permit a conviction without evidence or denial of trial in the district court, and then upon appeal to this court the Government could *cure all errors and denial of due process* by submitting to this court *de novo* additional evidence, which in this case, if offered in the court below by petitioner, would plainly have been rejected by the district court on the authority of *United States* v. *Grieme*, 128 F. 2d 811. It is a fundamental rule that the erroneous exclusion of admissible evidence cannot be converted into harmless error on the theory that the jury would not believe it or because it is thought to be preposterous and unreasonable. Cf. *Edwards* v. *United States*, 312 U. S. 473.

The Government overlooks entirely the opinions by this court that in criminal cases if evidence is excluded which is material or relevant it is presumed to be prejudicial and reversible error. This is especially true where it is shown that there was no trial, no inquiry and no hearing on the issue to which the excluded evidence related. *Crawford* v. *United States*, 212 U. S. 183, 203; *McGinis* v. *California*, 247 U. S. 95.

Bowles Case Not In Point Here

The opinion of this court in *Bowles* v. *United States*, 319 U. S. 33, does not sustain the Government's position in this case because the facts are altogether different. There the point presented upon the merits was whether only members of a recognized religious sect were entitled to classification as conscientious objectors. Naturally this point became moot upon appeal when it developed that the *order and decision* of the Director (of which the court could take judicial notice, upon an appeal to the Director and investigation by the Department of Justice) decreed and found as a fact that the claim of Bowles was *fictitious* and *false* and that he was *not in fact* a conscientious objector. No such situation is presented here. The Selective Service System has made no such finding against petitioner's claim as a minister. The undisputed evidence and records of that *System* show that petitioner is a *minister of religion*. If Bowles had presented to this court the proposition that the System erred in finding as a fact that he was not a conscientious objector, a different question would have been before this court for consideration, which may have prevented a dismissal of the petition for writ of certiorari because the question presented was moot. But the rule in the *Bowles* case can not apply in the case of a minister who has been denied his claim by the National Director in the teeth of evidence showing him to be a minister and recognized by his denomination.

The status of a minister of a denomination *recognized by the Selective Service System* is not nebulous and is easy of determination. Ministerial status does not involve the niceties of conscience and belief and mental attitude as does the status of a conscientious objector. If the rule in the *Bowles* case be held applicable here, because of the action taken by the Selective Service System, then the court should reconsider its ruling in the *Bowles* case on the grounds that it permits the Director to make an *ex parte* ruling that is *supreme* and unimpeachable by a registrant in defense to

an indictment, which denies the defendant his *right of trial* in the United States courts and substitutes in lieu the fiat of the Director in the same manner as does the *Grieme* decision, and would be subject to the same objections urged here against the *Grieme* rule. Again it is urged that it is unnecessary to consider the *Bowles* opinion because it is not applicable here.

Documentary Evidence Offered Should Have Been Admitted In Trial Court Regardless of Whether Issue Was One of Fact or Law

Another argument that demonstrates the unsoundness of all the Government's contentions is, that the documentary evidence rejected was properly excluded from the record because "self-serving declarations" and as not being the "best evidence" of the matters contained therein. (See Government's brief, page 14, footnote 8.) The answer to both those contentions is that if the local board, the appeal board and the Department of Justice hearing officer considered the affidavits and evidence and made them a part of the file, which they were, then it is not the province of a district court on review to reject them. Under Selective Service Regulations the only sort of evidence that can be received and placed in the evidence is written statements or affidavits. If the strict rule of evidence for trial in judicial proceedings is invoked to exclude evidence adduced before an administrative agency at a hearing reviewing the proceeding by a district judge, then the court should hold that a registrant should have counsel to represent him before the board and also require regulations establishing such rules of evidence.[13] If the hearing in all cases is not *de novo* in the district court and the court must review the file as in *habeas corpus* cases, then how can the court determine what

[13] Reg. ss. 623.2, 625.2 (b).

will be considered and what will not be considered in the file? If the "self-serving declaration" objection is sustained as to the material in the file, then the court would be obliged to reject the Questionnaire and Conscientious Objector's forms also, leaving only the notice to report for induction in evidence. By applying the same analogy, a defendant in a criminal case could be denied the right to testify in his own behalf because his statements on the witness stand are 'self-serving'.

The Government also argues that the proffered evidence pertained to a matter of law, to wit, whether the board was without jurisdiction or whether petitioner was exempt from training and service. It is said that such matters are exclusively for the trial judge to determine and were properly excluded from the evidence and consideration by the court below, because not a matter for the jury to determine. (See Government's brief, page 24, footnote 11.)

This argument is specious and falls flat for several reasons. In the first place, if it is a matter of law for the trial judge, it is nevertheless the duty of the trial court to receive the evidence so that the trial judge can consider it. The trial judge cannot consider evidence not in the record and cannot pass upon a question of law that is not presented in the record, and is not to be applied to the facts. To present the question to the trial judge it was imperative that he receive the documentary evidence. Then he could pass on the issue and not until then. It cannot be received *de novo* and for the first time in this court, because this court does not have original jurisdiction in criminal matters. Because it may be said to relate to a *matter of law* did not cure the error of exclusion.

If the issue is established as a matter of law, by undisputed evidence, and no question for the jury is presented, as contended by the Government, then there could not be a judgment of guilt entered in this case. The defendant is entitled to a trial by jury. In criminal law it is beyond the

power of a district judge to take a case away from the jury and instruct a verdict for the Government. So to do would violate the constitutional right of trial by jury. *United States* v. *Taylor,* 11 F. 470, 471; *Cain* v. *United States,* 19 F. 2d 472; *Blair* v. *United States,* 241 F. 217, cert. den. 244 U. S. 655. The only time the judge can take a case away from a jury in a criminal case is when the judge instructs a verdict for the defendant and orders the indictment dismissed. That should have been done in this case; but if the record is not sufficient to warrant that conclusion, it was, albeit, the duty of the trial judge to permit the jury to pass on the question of whether petitioner was in fact a minister as he claimed or whether he had fictitiously and falsely impersonated a minister before the local board; and the trial judge could not instruct the jury to return a verdict of *guilty* as he did in this case.

The 'Draft Scheme' as Applied to Jehovah's witnesses by National Headquarters of the Selective Service System

Facts concerning Jehovah's witnesses and the *draft* have been viewed by the Government in the same limited scope as the fundamental questions of law. The bad perspective which the Government has of the activity of Jehovah's witnesses under the Selective Training and Service Act has caused it to make certain statements in its brief which cannot go unanswered.

(A)

PETITIONER DOES NOT CLAIM UNFAIR ADMINISTRATION OF THE ACT BY THE EXECUTIVE BRANCH AGAINST JEHOVAH'S WITNESSES

In its brief (pp. 19, 64-78) the assertion that petitioner has charged General Hershey and others of the administrative branch of the Selective Service System with discrimination against Jehovah's witnesses is unfounded. Petitioner does not charge the administrative branch of the system

with discrimination in treatment of Jehovah's witnesses. The charge is that the local and appeal boards have denied the petitioner his claim as a minister. It was the board's duty to classify the petitioner and the duty of the appeal board to correct an illegal classification. Both boards denied petitioner his rights, contrary to law. The administrative branch (National Headquarters and State Headquarters) declined to exercise its discretion in the matter.

The Government is challenged to point out wherein petitioner's brief charges the administrative branch with discriminating in dealing with Jehovah's witnesses.

To operate the system and to administer it is a tremendous task and it is impossible for any such monumental undertaking affecting so many millions of men to be free from error. There is no human device whereby an administrative headquarters of such a prodigious system can be operated so as to keep the local and appeal boards on the same high plane upon which the National Headquarters operates.[14] If the local boards and appeal boards had followed the directives and opinions of National Headquarters concerning Jehovah's witnesses, there would not have been such a great number of cases of "injustices" committed against Jehovah's witnesses. These injustices cannot be and are not attributed to the administrative headquarters of the system. It is impossible to guarantee a determination of the many cases in a manner equivalent to the determination of judicial causes by the courts, because the local boards are composed of men untrained in law, such as the 'butcher, the baker and the candlestick maker'. The appeal system is not adequate to guarantee due process of law. The appeal scheme is not on a par with the judicial appeal of the state and federal judiciary. Mistakes will inevitably result in the operation of the Act under the system, and there must be a review allowed in the courts to protect the citizens against

[14] See letter from General Hershey, APPENDIX A, infra, pages 45-49.

abuse, and especially for that class of persons exempt from training and service under the statute.

(B)

ANALYSIS OF CERTIFIED OFFICIAL LIST OF JEHOVAH'S WITNESSES PROMULGATED BY NATIONAL HEADQUARTERS OF SELECTIVE SERVICE REVEALS FALSITY OF GOVERNMENT'S CHARGE OF ABUSE

Concerning the list certified by National Headquarters to State Headquarters, it should be noticed that this list did not include all male pioneers of the Watchtower Bible and Tract Society. In view of the fact that the Selective Training and Service Act in June 1941 required training and service only of individuals between the ages of 21 and 35, the Selective Service System, National Headquarters, specifically required that the names to be included on the list submitted be confined to men between the ages of 21 and 35. Pursuant to that request, a list was prepared and submitted containing 951 names. It did not include pioneers above the age of 35 or under the age of 21.

It is noticed that the list of February 20, 1942 contained the names of 790 (actually only 789). This decrease was due to the removal by the Society of 187 names of such individuals who failed to maintain the high standard established by the Society in harmony with the agreement between it and the Selective Service System as a condition for keeping a man's name on the pioneer list. Shortly after the list was completed in June 1941, it was anticipated that new pioneers would be added to the list. It was necessary to establish a policy in regard to adding new names to the administrative instrument, to wit, the certified official list. Those standards were fixed by the Selective Service System and later pronounced by letter dated October 18, 1941, signed by Lt. Col. Carlton S. Dargusch, Deputy Director.[15] Between June 1941 and February 20, 1942, the names of

[15] APPENDIX C, infra, pages 50-51, this brief.

25 new pioneers were added by National Headquarters upon application of the Society, making a total of 789 names on the list as of February 20, 1942, the date that the second list was certified to State Headquarters.

The list grew from 789 names in February 1942 to 1026 names in December 1942. This large increase was attributable almost exclusively to the broadening of the age bracket of men liable for training and service under the Act by amendment raising the age from 35 to 45. Among the pioneers of Jehovah's witnesses who registered in February 1942, pursuant to Presidential proclamation, 205 of them were on the pioneer list prior to June 1941 and, pursuant to an agreement with National Headquarters, they were considered eligible for automatic addition to the list as of June 12, 1941.[16] During July 1942 National Headquarters automatically added to the list the above-mentioned 205 pioneers. From January 1942 to December 1942 the names of 94 new pioneers were added to the list. During this same period of time the Society, pursuant to agreement to maintain strict standards, dropped from the pioneer list the names of 62 men, which names were deleted from the certified list on information provided by the Society. During this time there was a net increase of only 32 names in the list.

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[16] See letter dated April 21, 1942, addressed to Lt. Col. Carlton S. Dargusch, National Headquarters, APPENDIX D-1, infra, page 52, this brief; and letter dated May 19, 1942, addressed to Commander P. H. Winston, National Headquarters, APPENDIX D-2, infra, pages 53-54, this brief.

Below is shown a table of the history of the certified official list, giving a summary of the action taken by National Headquarters concerning deletions and additions to the list made upon information furnished by the Society. The table is compiled from records of the Society and correspondence to and from National Headquarters. The Government is challenged to impeach it or to prepare a counter-table of figures sustaining the contention that the list swelled overnight, as claimed in the brief filed by the Government.

[A]

Original certified official list, names		951
1. Names of new pioneers added on application from June 1941 to February 1942	25	
2. Names dropped by Society because of failure to maintain standards	187	
3. Total remaining after above additions and deletions		789

[B]

Second certified official list, names		789
1. Miscellaneous additions on separate applications from January 1942 to September 1942	16	
2. Addition by joint order April 22, 1942	20	
3. Addition by joint order May 15, 1942	14	
4. Addition by joint order June 5, 1942	20	
5. Addition by joint order July 1942	21	
6. Miscellaneous additions October 1942	3	
7. Total additions	94	
8. Names dropped from list by Society from January 1942 to December 1942 because of failure to maintain standards	62	
9. Net increase in list		32
10. Automatic addition of pioneers on Society's pioneer list before June 1941, who were included in increase of age bracket by amendment of Act, and added to the list as of June 12, 1941		205
11. Total names on list December 1942		1026

[C]

Third certified official list, names	1026

The statement on page 71 of the Government's brief, that "the volume of applications became so great that it was impossible to pass upon each one individually", is not accurate. The change of policy was not due to an overnight increase of new pioneers, as charged by the Government. The method of investigating each new application to be added to the list through the local boards put a heavy burden upon the limited stenographic force and personnel of the section of Selective Service National Headquarters having charge of "religious bodies"; but the real reason for the change was that the policy of investigation and addition to the list upon the move of National Headquarters through the local boards caused strife and objections to be raised on the part of some local boards that the National Headquarters was encroaching upon the "original" jurisdiction of the local boards on matters of classification; and it was then considered more appropriate to let each new pioneer handle the matter individually with his local and appeal board, subject to the right of appeal to the President or application for discretionary review by the Director. It is not accurate for the Government to assert that the list increased and mushroomed overnight and to imply that it was used as a means of evading the draft.

It was never the policy of the Selective Service System to say that only those persons named on the list would be entitled to classification as ministers and entitled to claim exemption from training and service as provided by the Act. (See pages 25, 33-36, supra, and APPENDIX A, infra, pages 45-49.)

(C)

ANALYSIS OF RECORDS OF WATCHTOWER BIBLE AND TRACT SOCIETY REVEALS FALSITY OF GOVERNMENT'S CHARGE OF UNDUE INCREASE IN ITS ROLL OF FULL-TIME MINISTERS

The records show that there has not been an extraordinary increase or 'mushroom' development or increase in the pioneers or Jehovah's witnesses generally on account of the draft. The growth of the organization and the increase of its ministers have been natural and in proportion to the increase of previous years.

From examination of the records of the Watchtower Bible and Tract Society it is established and counsel asserts that 52 percent of all pioneers are women; 16½ percent are men over 38 years of age; and 31½ percent are men under the age of 38, many below 18. These percentages have been prepared by counsel upon an investigation and compilation of the record of all pioneers of the Society.

A list of figures taken from the *Yearbooks* and Society's records is set forth below, showing the proportionate increase in pioneers, company publishers, and attendance at the annual conventions of Jehovah's witnesses.

Year	Pioneers	Company Publishers	Convention Attendance	Yearbook
1932	1,997			1933 p. 50
1933	1,976	16,058		1934 p. 43
1934	1,776	18,967	15,000	1935 pp. 41, 48-49
1935	1,829	20,786	20,000	1936 pp. 53, 55
1936	1,831	21,415	25,000	1937 pp. 68-69, 75
1937	1,838	21,689	30,000	1938 p. 56
1938	1,910	25,596	65,000	1939 pp. 59, 74
1939	2,176	35,466	75,000	1940 pp. 56, 69
1940	2,686	47,762	79,335	1941 pp. 71, 90
1941	4,049	56,745	115,000	1942 pp. 42, 59
1942	5,290	62,179	129,699	1943 pp. 39-40, 68

The Government would have the court led to the belief that the Society did not actually consider the total number of pioneers and company publishers as ministers

during those years; but that the Society "recognized" only those whose names appear listed in the *Yearbooks* for those years. (See Government's brief, pp. 74-75, footnote 68.) The list of names in each issue of the *Yearbook* is not a true criterion to apply and has never been considered by the Society as limiting the ordained-minister status of other of Jehovah's witnesses. The list of names published each year in the *Yearbook* consists only of those persons who are recognized by the Society as elders and sent forth as traveling supervising ministers to visit the various congregations of Jehovah's witnesses, with power of visitation, to check records, settle disputes, supervise preaching activity, and report generally the condition of the congregations to headquarters. In this sense the list comprises only special representatives who occupy a status analogous to bishops of "recognized" orthodox sects of religion.[17]

It is interesting to note how the Government has treated the above figures in its brief. From the year 1932 to 1939 the figures employed in its discussion (Brief, page 75, footnote 69) were *averages*. But when the Government comes to consider the year 1940 to 1941 it abandons the *average* number of pioneers in full-time service and seizes hold of the month of each year where the highest number of pioneers is shown to have reported. Why did not the Government use the same gauge when it reached 1940?

This change in standards of calculation is employed by the Government to bolster its factitious conclusion that there has been an overnight influx of men into the pioneer work on account of the draft law. It is noticeable that the increase during all the years has not changed the percentage of women engaging in this work, which has always been

[17] Compare the language of 1943 *Yearbook*, page 18, to wit, "There are many other ordained ministers of Jehovah's witnesses whose names are not listed in this year's report, but those that are listed are specially equipped to look after their ministerial duties at the headquarters of the Watch Tower Bible and Tract Society or its branches or as traveling evangelists."

higher than 50 percent. There could be no objection to the Government's use of the "high" figures of the years after 1940 if it had used the "high" figures of each year before 1940.

The apathy of the Government to records and figures concerning the normal and gradual increase of pioneers reaches a climax when the number of pioneers for the year 1942 is considered and discussed. Blind to the *Yearbooks* before it, showing the figures and from which it quoted as authority, the Government says that there was a "total increase during 1942 alone of 5,052 in the number of pioneers, an increase of nearly 100 percent." The actual difference between the *average* totals of pioneers for the year 1941 and 1942 is 1241, or an increase of approximately 25 percent. In its frenzy the Government *overshoots* the mark by 75 percent so as to sweep the court into the conclusion that there was a 100 percent increase during the year 1942, contrary to the facts and the fundamentals of arithmetic. This effort on the part of the Government leads to preposterous results. If there were 5,463 pioneers at the end of 1941 an increase of 5,052 would make a total of 10,515 pioneers at the end of 1942. The records do not support this conclusion. The highest number of pioneers reporting for any one month during the year 1942 was 5,742 for the month of September, which is the last month of the fiscal year. At the end of the year 1941 there were only 5,463 pioneers (1941 *Yearbook*, page 46), or a difference of 289. The figures for the last month of each fiscal year cannot be taken as a criterion of the average increase. A check of the Society's records shows that the difference between the highest figures of each year and the average is accounted for by the fact that many children of high-school age during summer vacation from school engage in the work as full-time pioneers and at the end of their vacation must return to school; and also, a large number of adults who follow seasonal avocations pursue full-time pioneer activity during the time

they are not engaged in such seasonal secular occupations. The average number of pioneers for 1941 was 4,049; and for 1942, 5,290, or a difference in averages of 1241 pioneers. The Government's excuse for this enormous statement is based upon the 1943 *Yearbook* at page 44, where it is said that there was an average monthly increase of 421 pioneers. The *Yearbook* does not say that this was a progressive monthly increase, but that during each month of the year 1942 there was a *monthly average* of 421 general pioneers above the total corresponding monthly average in the field during the previous year.

In connection with the statement in the Government's brief (page 71, footnote 62), that the Selective Service System had established an estimate that allowance be made for an increase in pioneers of from 50 to 80 per year, it appears from the records that such a limitation was unduly harsh. The National Headquarters did not issue a ruling that Jehovah's witnesses would be limited to this number of new pioneers per year. This pertained only to the increase of the number on the certified list, an administrative instrument. No definite conclusion was reached and no order was made and published to Jehovah's witnesses as to any number to be fixed to limit the additions to the list. While conferences and negotiations were going on between the Society and the Selective Service Headquarters in an effort to agree upon a fixed number for an annual increase of the list, the policy of adding names to the list was discontinued and the question of the number to be limited became moot.

Only by doing violence to the presumption of innocence and drawing false or factitious conclusions from the record can it be inferred that petitioner's entry into the pioneer work in 1940, two weeks before the adoption of the Act, was not for a noble purpose and in good faith. Indeed the presumption of innocence and the absence of any evidence in the record to impeach his move to join the pioneer work

at that time impels the conclusion that petitioner stands on the same plane as those who may have entered the ministry years before. To do otherwise would be to give *ex post facto* effect to the law contrary to the Constitution. It is noticed that in the Act provision is made for exemption of students preparing for the ministry as well as ministers.

Whether petitioner was a part-time minister prior to September 1940 is immaterial and does not work against his legal rights. He was a minister, even before September 1940. He merely obligated himself to devote more time to field service by becoming a pioneer. The 150 or 175 hours per month spent in preaching is actual house-to-house preaching. It does not include time used for current preparation, current study for conducting Bible classes, making out daily reports, etc. Ministers of orthodox religions do not spend that many hours actually preaching. After a brief sermon once or twice on Sunday and once or more times during the week the rest of the time the orthodox ministers may devote to personal matters, etc., as they see fit. The preaching time spent by the orthodox clergy compares more nearly to the time spent by the part-time minister of Jehovah's witnesses in actual preaching.

Obligations of the ministry for one of Jehovah's witnesses includes preaching until death or until Jehovah's battle at Armageddon. Of and concerning the preaching of this gospel in all the world for a witness unto all nations, Jesus says: "The harvest truly is plenteous, but the labourers are few; pray ye therefore the Lord of the harvest, that he will send forth labourers into his harvest." (Matthew 9:37, 38; 24:14) That directive of the Master for a *specific* prayer remains effective during wartime as well as in peacetime. The Society and Jehovah's witnesses cannot stop their preaching or the increase of their preaching in time of war or in time of peace. Surely the Government does not desire to oppose the preaching activity of Jehovah's ministers by imprisoning them. Such work and its in-

crease will continue after this war—after suspension or repeal of the Selective Training and Service Act. The constant increase is not due to the war but to Jehovah God, who *gives* the increase, as it is written:

"Who then is Paul, and who is Apollos, but ministers by whom ye believed, even as the Lord gave to every man? I have planted, Apollos watered; but *God gave the increase.*"—1 Corinthians 3:5-7; cf. Psalm 127:1, 2; Isaiah 9:6, 7; 40:28-31.

It has ever been the policy of the Watchtower Society to encourage increase in the rank of full-time pioneer ministers. Every one of Jehovah's witnesses desires ultimately to devote his entire time and life to preaching the good news of God's Kingdom, whether in summer or winter, war or peace. Because of the shortness of time to give a world-wide witness, each one of Jehovah's witnesses, whether a part-time or full-time minister, *always* has been and is encouraged to put more time into the *service* and not because of war conditions. (Matthew 24:14) By each one devoting more time to preaching he is 'provoking willing hearers to love and good works, . . . exhorting, and so much more' as THE DAY approaches.—Hebrews 10:24, 25; see, also, 1 Peter 4:7-11.

Conclusion

A review of the annals of Anglo-American criminal trial jurisprudence since the proclamation of Magna Carta will not reveal a case where due process and the fundamental rights of a defendant charged with crime have been so grossly flouted and violated by the prosecutors and the courts as in the proceedings in this case. It will be conceded by all that under the statute, at some stage of the proceedings, petitioner has a right to be heard on his claim that he is exempt from the terms of the statute. But when all is "said and done" a reflection will reveal that this and all other

defenses have been denied to him in these proceedings. The Government has been unable to explain why this admitted denial of due process of law in this criminal proceeding should be approved by this court.

The Government's argument, if accepted, would revamp and reconstruct a necessary and valid act of Congress, making of it a monstrous armored machine of prosecution, geared at such high speed that its operators cannot see the plainest guide posts and highway signs along the procedural road built through centuries of carefully considered criminal jurisprudence. Hurtling petitioner headlong through the "judicial process", the Government's titanic machine reaches this court, the last bulwark of law and liberty. It heads straight for the supporting pillars of the juridical edifice, carrying in its wake the sanction of almost every federal tribunal inferior to this august forum.

Squarely confronting this Court is the all-important question: Will this free land's ranking judicial officers step aside now to mollify the "practical considerations" and *policy* arguments of the executive department that was created by its sovereign people, and allow the pillars of due process to be mangled, shattered to bits as by a 'juggernaut', with the resulting impact crashing the house of judicial protection within which dwell all inhabitants of America?[18]

To stop and permanently turn aside the threatening inrush of alien legal precepts, and to avoid a perpetuation of judicial blunders of the inferior federal courts in prosecutions under the Act which "seriously affect the fairness, integrity or public reputation of the judicial proceedings"[19]

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[18] Consider *The American Doctrine of Judicial Supremacy* (C. Grove Haines), revised edition, *passim*.

[19] *Johnson* v. *United States*, supra.

it is necessary to reverse the judgments below and let a judgment be entered dismissing the indictment or, in the alternative, remanding the cause to the district court for a trial in accordance with the law of the land of liberty.

Confidently submitted,

HAYDEN C. COVINGTON
VICTOR F. SCHMIDT
Counsel for Petitioner

APPENDIX A

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
21ST STREET AND C STREET, N. W.
WASHINGTON, D. C.
July 7, 1943

IN REPLYING ADDRESS
THE DIRECTOR OF SELECTIVE SERVICE
AND REFER TO NO.
1-6.26-77

Mr. Hayden Covington
117 Adams Street
Brooklyn, New York

Dear Mr. Covington:

May I acknowledge receipt of your letter of June 19, the purpose of which was to recommend to me that I take summary action against Local Board No. 133, Brooklyn, New York. In your correspondence you have made an effort to establish proper grounds for my taking such action

through an analysis of the policy of this Headquarters with regard to registrants who are members of Jehovah's Witnesses. The basis for your recommendation is that Local Board No. 133 has undertaken to reclassify from Class IV-D to Class I-A members of the Bethel Family of Jehovah's Witnesses. I hasten to advise you that the premises upon which you base your recommendation are not consonant with our philosophy and our interpretation of the law, and I feel that we should make certain statements in this regard.

The Selective Service System is divided into two distinct branches which, for want of better terms, we will call operational and administrative. The operational branch of Selective Service consists primarily of the local boards, boards of appeal, and Presidential appeal. The administrative branch of Selective Service consists primarily of National Headquarters and State Headquarters.

With regard to the operational branch, the Selective Training and Service Act of 1940 provides as follows:

"There shall be created one or more local boards in each county or political sub-division corresponding thereto of each State, Territory, and the District of Columbia. . . . Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe."

The operational branch of Selective Service has the power of determining classification of registrants affecting their inclusion for, or exemption or deferment from, training and service.

The administrative branch of Selective Service has no authority to classify individual registrants but rather promulgates rules and regulations prescribed by the President, and generally administers to the conduct of the Selective Service System as a governmental agency.

The Selective Service Act provides that regular or duly ordained ministers of religion shall be exempt from training and service but not from registration under the Act. In Selective Service Regulations there is an assisting definition with regard to the terms "regular minister of religion" and "duly ordained minister of religion."

This Headquarters was advised that all persons adhering to the principles of Jehovah's Witnesses considered themselves as ministers of religion and, therefore, entitled to exemption. Local boards and appeal agencies, however, did not classify all Jehovah's Witnesses as ministers of religion. In due time the Watchtower Bible and Tract Society, through you, presented this matter for consideration of this Headquarters. You were informed of the opinion of this Headquarters that the Watchtower Bible and Tract Society and Jehovah's Witnesses could be considered as included under the phrase "recognized church, religious sect, or religious organization." You were, however, informed that this Headquarters did not agree that all persons subscribing to any religious belief could be considered as ministers since this was considered contrary to the normal concept and to our concept of ecclesiastical organization. We did feel, however, that Jehovah's Witnesses, being a religious organization, would be entitled to consider some of their members as ministers. We were willing to express this opinion to the Selective Service System and, in order that you might indicate a reasonable number of those who were recognized by your organization as ministers, you were privileged to submit a list of such persons to this Headquarters.

We received the list which you submitted and made it

available to the Selective Service System. At the same time we promulgated National Headquarters Opinion No. 14 generally with regard to Jehovah's Witnesses as an organization and to its members with reference to the list which you had submitted and which was made available to the System. National Headquarters Opinion No. 14 is no more than its title implies, an administrative opinion of National Headquarters with regard to members of Jehovah's Witnesses. The official list of Jehovah's Witnesses is no more than information from National Headquarters as to those members who, within the limited concept of religious organization, are recognized by the Watchtower Bible and Tract Society as ministers. Contrary to your contention, this opinion and list do not constitute "settled principles of law" and do not erect a barrier beyond which the discretion of the local board cannot be exercised. A local board may, in any individual case, substitute its opinion for a general opinion of National Headquarters. Incidentally, and to answer your statement, local boards are not compelled to furnish legal foundations and detailed analyses of the reasoning leading to classification decisions.

Not only in the instant case, but in all cases of classification, information and opinions of National Headquarters bearing upon the classification of registrants are subject to a contrary determination by local boards and appeal agencies. Under the law there is no person, including the Director, who can make decisions of classification binding local boards on "questions or claims with respect to inclusion for, or exemption or deferment from, training and service." Upon such questions the decision of the local board, subject to appeal, is final. Administrative determinations of a purely procedural nature may bind local boards where they do not encroach upon the legal provinces of such boards.

Action may be taken by the administrative branch requesting reopening and reconsideration of a case, taking

an appeal, postponing an induction, or requiring other similar action. This does not constitute a determination of the merits of a particular case but merely brings into play certain administrative procedures.

You may expect from this Headquarters a continued administrative consideration of your problems. We are willing to consider for administrative action any individual cases which you may desire to present and which warrant such procedures. We cannot, however, subscribe to your view that we have, by our opinion or by the official list, deprived any of our local boards or appeal agencies of the authority to determine questions in instances where that authority resides in the local boards and appeal agencies under the provisions of the Selective Service Act.

Sincerely yours,

LEWIS B. HERSHEY, *Director*

APPENDIX B

Excerpts from Brief of the Appellee in *Benesch* v. *Underwood*, No. 9271 United States Circuit Court of Appeals for the Sixth Circuit. At page 15 of that brief, footnote 9, *inter alia*, reads:

"The list at National Headquarters was established for the reasons set forth in General Hershey's opinion of June 12, 1941 (R. 14-18), i. e., primarily because (R. 15) 'The unusual character of organization of Jehovah's witnesses renders comparison with recognized churches and religious organizations difficult.'"

Quoting from pages 17 and 18 of the brief:

"Again, while ministers are exempt from training and service, the decisions of the local draft boards on all claims for exception are, by statute, made final, subject only to review by appeal boards established in accordance with the Act. Consequently, the inclusion of Benesch's name on the list of 'Pioneers' maintained at National Headquarters

would not, *ipso facto,* entitle him to classification as a minister; neither could it be made a prerequisite to such classification. The inclusion of a name on the list is, at the most, evidence which may be considered by the local board in classifying the registrant. If it were otherwise, the officials at National Headquarters would be usurping the function which Congress delegated solely to the local boards. Consequently, assuming, *arguendo,* that National Headquarters may have been persuaded by the local board's letter to exclude his name, that fact may not be said to have been unfair or prejudicial to Benesch."

APPENDIX C

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
21ST STREET AND C STREET, N. W.
WASHINGTON, D. C.
October 18, 1941.

IN REPLYING ADDRESS
THE DIRECTOR OF SELECTIVE SERVICE
AND REFER TO NO.
1-10.18-77

Mr. Hayden Covington
117 Adams Street
Brooklyn, New York.

Subject: Additions to list of Jehovah's Witnesses.

Dear Mr. Covington:

We have received and there are now pending in this Headquarters, a number of requests that names be added to the certified list of members of the Bethel Family, Pioneers, etc. Those requests will be considered as they have now been submitted unless, in individual cases, this office may request further information.

With respect to future requests, we will require that there be submitted the following minimum documents in each case:

1. Application of the Watchtower Bible and Tract Society, Inc., that the name be added to the certified list on file in this Headquarters.

2. Affidavit of the Secretary of Evangelists or some other comparable official of the Watchtower Bible and Tract Society, Inc., to the effect that the qualifications of the individual have been inquired into, that he appears on the records as a member of the Bethel Family, Pioneer, etc., the date when his name was placed on such records, and reasonable detail as to his functions and duties.

3. Affidavit of the individual himself with respect to his ministerial training, his ministerial duties, his secular occupation, and the number of hours per month devoted by him to ministerial work.

4. Affidavit from some friend, neighbor, or associate with respect to the individual's activity in ministerial work, and the fact, if it be so, that the individual is recognized as having a standing, in the relationship to the organization and to the other members of Jehovah's Witnesses, similar to that occupied by regular or duly ordained ministers in other religions, and that such individual spends all or a substantial part of his time in the work of Jehovah's Witnesses.

In the application it is necessary that there be set forth the individual's full name, address, local board, city, county, and state of the local board, and the individual's Selective Service order number.

For the Director,
CARLTON S. DARGUSCH
Lt. Colonel, JAGD
Deputy Director

APPENDIX D-1

LAW OFFICES OF
HAYDEN COVINGTON
BROOKLYN, NEW YORK

April 21, 1942

Lt. Col. Carlton S. Dargusch,
Deputy Director, Selective Service,
Washington, D. C.

Dear Colonel Dargusch:

At the February registration, a great number of men who have been on our pioneer list and members of the Bethel Family for many months and years, were required to register.

I assume that, pursuant to our conversation of December 31, 1941, regarding such registration, these men will be automatically added to the old list without individual application having to be made in behalf of each.

The Society has obtained from each one so registering his full name as registered, his local board number and address, which information, together with the date of appointment as full-time worker, is shown on the face of the enclosed list and it is hoped that upon a consideration thereof you will find the same sufficient to act on the name of each individual appearing on the list.

I also assume that you will desire that an additional list be submitted of the individuals that are required to register this month, between the ages of 45 and 64. Kindly consider and advise.

Yours sincerely,
HAYDEN COVINGTON

PS: Colonel Dargusch: Original and one carbon of the above letter sent you previously, but without new lists, which are attached hereto.

APPENDIX D-2

LAW OFFICES OF
HAYDEN COVINGTON
BROOKLYN, NEW YORK

May 19, 1942

Commander P. H. Winston,
Selective Service System,
Washington, D. C.

Dear Commander Winston:

This letter serves as a memorandum of our conversation on May 12, 1942, in reference to Jehovah's witnesses.

With reference to the list forwarded to your office containing names of members of the Bethel Family and pioneers required to register on February 16, 1942, which the record shows to have been on the pioneer or Bethel Family list as of June 12, 1941, each will be automatically admitted to the certified list. However, as to such whom the record shows not to have been in such full time service on or before June 12, 1941, but who have been so engaged since such date, it will be necessary for this office to submit the customary application with accompanying affidavits from each applicant, to have any individual's name certified to various State Headquarters.

Such applications will be supplied to your headquarters in due season.

You will notice that opposite the name of each person, the date of which each was admitted to full time status is shown. This will enable you to separate those automatically entitled to be added to the certified list from those applicants for whom applications must be filed. If the list is not in a satisfactory form, advise. Kindly acknowledge.

In order that injustices be avoided pending the determination of all pending applications for certain of Jehovah's witnesses to be added to the certified list, I understand that the National Headquarters of Selective Service System will forthwith issue to the local boards having jurisdiction over each registrant in each application an order to suspend any action with reference to or upon the registrant's classification until National Headquarters has determined whether or not the particular registrant will be added to the certified list.

The need for an order of this nature in each case is that oftentimes the board may not recognize the registrant's request to suspend action in his case and may proceed to order him to report for induction or take other steps which would injure his status under the Selective Training and Service Act and frustrate his application to be admitted to the certified list.

Yours sincerely,
HAYDEN COVINGTON

copy—Major Edward S. Shattuck